Supreme Court, U.S.
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No. 02-572

IN THE

Supreme Court of the United States

INTEL CORPORATION,

Petitioner,

v.

ADVANCED MICRO DEVICES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The National Association of Manufacturers (NAM) — eighteen million people who make things — is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

NAM members have an important interest in the correct interpretation and enforcement of 28 U.S.C. § 1782. Many NAM members do business in foreign countries, and are thus subject to the kind of official investigations that gave rise to the discovery dispute addressed by the Ninth Circuit in this case. By vastly expanding the scope of allowable discovery in this country pursuant to § 1782, the Ninth Circuit's ruling threatens a significant increase in the already substantial burdens and costs American corporations face as a result of judicial discovery. The Ninth Circuit's ruling also poses the particular danger of allowing companies that do business overseas to obtain sensitive, and competitively damaging, information from their business rivals by the simple expedient of petitioning foreign enforcement authorities to commence an investigation — even where the foreign authority would not itself authorize discovery and where the company seeking the discovery is not a party to any foreign judicial proceeding.

The NAM seeks review because it believes that the Ninth Circuit's egregiously expansive reading of § 1728 should be reversed, and that the provision should be interpreted in a manner that comports with the intent of Congress and with common sense. At a minimum, however, achieving a clear and uniform national rule concerning the scope of allowable discovery under § 1782 is important to

NAM members and to other businesses that are, or are contemplating, doing business in foreign countries. Such companies need to be able to factor the costs and risks of such discovery (especially the risk of disclosure of valuable competitive information) into their assessments of the wisdom of entering new markets.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

As the petition for certiorari filed in this case demonstrates, the Ninth Circuit's interpretation of 28 U.S.C. § 1782 raises two significant issues on which the Circuits are in direct conflict.

The first conflict involves the question whether a private entity may obtain discovery in this country pursuant to § 1782 when the same discovery is not authorized in the alleged foreign "proceeding" on which the entity relies to invoke § 1782 in the first place. The Ninth Circuit has held in this case that discovery under § 1782 is available in those circumstances. Pet. App. 8a. The Second and Third Circuits have similar rules. *Euromepa, S.A. v. R. Esmerian, Inc.*, 154 F.3d 24, 28 (2d Cir. 1998); *In re Bayer, AG*, 146 F.3d 188, 193 (3d Cir. 1998). The First, Fifth and Eleventh Circuits hold that discovery under § 1782 is not available in those circumstances. *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 7 (1st Cir. 1992) ("a litigant requesting assistance

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[1]Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent are on file with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, the NAM states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

under Section 1782 has to show that the information sought in the United States would be discoverable under foreign law"); *In re Letter Rogatory From First Court of First Instance in Civil Matters, Caracas, Venezuela*, 42 F.3d 308, 310 (5th Cir. 1995) (same when private party makes request); *In re Request for Assistance From Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988) (same).

The second conflict involves the question whether an adjudicative proceeding must be pending, or at least imminent, in a foreign tribunal before discovery under § 1782 is permitted in this country. In this case, the Ninth Circuit refused to impose such a limitation. Pet. App. 6a. The Second Circuit, in contrast, requires that a foreign adjudicatory proceeding be imminent before granting § 1782 discovery. *In re Application of Ishihara Chem. Co.*, 251 F.3d 120 (2d Cir. 2001); *In re Lancaster Factoring Co.*, 90 F.3d 38, 42 (2d Cir. 1996); *In re Request for Int'l Judicial Assistance (Letter Rogatory) for Federative Republic of Brazil*, 936 F.2d 702, 706 (2d Cir. 1991). *See also In re Request for Assistance From Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d at 1155-56 (indicating that private party may need to be actual litigant in pending proceeding to invoke § 1728).

There is a pressing need for resolution of these conflicts. The issues are certain to recur. Indeed, they will arise more frequently as commerce becomes increasingly global in scale. The current conflicts encourage inappropriate forum-shopping. And the scope of § 1782 discovery to which NAM members, and other U.S. companies, will be subjected will be determined by the fortuity of where they are located rather than by a uniform national rule. Moreover, the Ninth

Circuit's expansive interpretation of § 1782 raises serious issues of international comity by allowing foreign litigants to circumvent the limits on discovery that foreign nations have imposed, and thereby threatens to undermine fundamental choices these nations have made about how to structure their judicial systems.

Most importantly for NAM members and other U.S. businesses, the Ninth Circuit's sweeping expansion of § 1782 discovery will inflict serious harms and lead to widespread abuse. It should go without saying that the judicial discovery process already imposes massive burdens and costs on American businesses, even in the purely domestic context. Reform efforts in this country uniformly focus on simplifying and streamlining the discovery process to make it less burdensome, costly and contentious. The Ninth Circuit's reading of § 1782 threatens a dramatic increase of the very burdens and costs that federal and state authorities in this country have been striving to control. In this case, the Ninth Circuit adopted the most sweeping interpretation of § 1782 possible, choosing at every turn to reject sensible limits that other Circuits have placed upon the availability of such review. And the court did so for reasons untethered to any purpose of Congress or to common sense. Section 1782 was enacted to further international comity by assisting foreign and international tribunals in developing evidence relevant to their functions. The Ninth Circuit has gone far beyond that objective — indeed, it has turned that objective on its head — by authorizing domestic discovery whenever a private company petitions a foreign governmental entity for relief, irrespective of whether that entity would grant the discovery and irrespective of whether it would even conduct an adjudicatory proceeding.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's expansive interpretation of 28 U.S.C. § 1782 will inflict serious practical harms on NAM members and other U.S. companies. The decision has the potential to affect each and every one of the thousands of U.S. firms that operate or export overseas — as well as their corporate affiliates, investors, officers and employees located in the United States.

To understand the scope of the problem caused by the Ninth Circuit's reading of § 1782, it is critical at the outset to bring into focus both the enormous range of foreign investigations and proceedings to which American companies are now routinely subject and the fundamental differences between our system of adjudicating legal disputes and those of most other nations of the world. U.S.-based companies are subject to the jurisdiction of foreign authorities in any number of subject areas, from intellectual property rights to environmental issues to antitrust and competition matters to basic contract disputes. Numerous foreign and international entities investigate potential legal violations by U.S. firms. Many institute investigations in response to complaints from private parties. The European Commission itself has fifteen different Directorates General governing various aspects of European Union law, from antitrust policy to customs requirements. Indeed, the European Commission entertained 1,300 complaints of infringement in 2001 alone, in addition to the investigations that the Commission instituted on its own.[2] Likewise, individual nations empower countless agencies — from

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[2] *See* http://europa.eu.int/comm/secretariat_general/sgb/droit_com/pdf/infr_statserie1_table11_en.pdf.

securities commissions to tax regulators to competition authorities — to investigate companies operating in those countries. For example, the Republic of Ireland's Competition Authority investigates monopolies, mergers and cartels, *see* www.tca.ie; the Canadian International Trade Tribunal conducts inquiries into dumping, NAFTA compliance and other trade-related issues, *see* www.citt-tcce.gc.ca; and the Australian Securities and Investments Commission inquires into various complaints about corporations, *see* www.asic.gov.au.

In foreign investigations and proceedings, discovery is typically far more limited than in American courts. *See Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 542 (1987) ("It is well known that the scope of American discovery is often significantly broader than is permitted in other jurisdictions . . ."). For example, "[n]othing approaching [American] out-of-court fact discovery is permitted by civil law courts" in continental Europe. Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 Am. J. Comp. L. 277, 293 (2002). Even compared to other common law legal systems, American discovery rules are far broader. *See id.* at 294 (American discovery rules provide "a set of mandatory investigation tools available to private litigants not found in the United Kingdom or elsewhere"). *See also, e.g.*, Bruce W. Bean, *Doing Business in the New Russia: Rebirth of the Russian Nation*, 35 Int'l Law. 961, 990 (2001) ("There is no discovery, as American lawyers know it, involved in Russian litigation."); Craig P. Wagnild, *Civil Law Discovery in Japan: A Comparison of Japanese and U.S. Methods of Evidence Collection in Civil Litigation*, 3 Asian-Pac. L. & Pol'y J. 1 (2002) (explaining stricter limitations on discovery

in Japanese litigation). Other countries not only place more limitations on document discovery, but also typically do not permit any testimonial discovery or discovery of entities that are not parties to the lawsuit. *See* Chase, 50 Am. L. Comp. L. at 294; *Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 561 n.18 (Blackmun, J., dissenting) ("In England, for example, although document discovery is available, depositions do not exist, interrogatories have a strictly limited use, and discovery as to third parties is not generally allowed.") (citation omitted).

It is one thing for NAM members and other American companies to be subject to the jurisdiction, laws and regulatory procedures of the foreign nations in which they do business. It is quite another to subject these companies to onerous American-style discovery sought by their direct competitors — both foreign and domestic — when that discovery is unauthorized by the foreign country whose laws the competitor invokes and when the competitor is not a party to any pending or even imminent adjudicatory proceeding in a foreign country. In both of these key respects — allowing discovery that another nation would not allow and allowing discovery even where an adjudication is not imminent — the Ninth Circuit has ignored sensible, and textually supported, limitations on the scope of § 1782 imposed by other Courts of Appeals. The bizarre result of this remarkably broad interpretation of the statute is that U.S. companies and related third parties are vulnerable to wide-ranging, American-style discovery simply because they operate overseas and for no other reason.

I. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT PRIVATE ENTITIES SHOULD NOT BE PERMITTED TO INVOKE SECTION 1782 TO OBTAIN DISCOVERY IN THIS COUNTRY WHEN THE DISCOVERY IS NOT PERMITTED IN THE FOREIGN PROCEEDING THEY INVOKE TO JUSTIFY SEEKING DISCOVERY IN THIS COUNTRY.

The Ninth Circuit's interpretation of § 1782 produces unfair and abusive results, disadvantages NAM members and other U.S. firms in overseas legal battles against foreign opponents, and disregards principles of international comity.

1. Allowing § 1782 to be used in the manner it was used here will severely disadvantage American companies involved in disputes with foreign competitors who do not do substantial business in the United States. Under the Ninth Circuit's rule, such foreign competitors can obtain discovery from both U.S. firms and related third parties under broad American discovery rules, while remaining subject themselves only to the more limited rules of the jurisdiction where the foreign proceeding has been instituted.

To eliminate that inequity, several Courts of Appeals have held that private parties cannot invoke § 1782 if the information sought would not be discoverable in the foreign proceeding. *See In re Application of Asta Medica, S.A.*, 981 F.2d at 5-6; *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d at 1156; *In re Letter Rogatory from the First Court of First Instance in Civil Matters, Caracas, Venezuela*, 42 F.3d at 310. As the First Circuit explained, "a United States party involved in litigation in a foreign country with limited pre-trial discovery

will be placed at a substantial disadvantage vis-a-vis the foreign party. All the foreign party need do is file a request for assistance under Section 1782 and the floodgates are open for unlimited discovery while the United States party is confined to restricted discovery in the foreign jurisdiction." *In re Application of Asta Medica*, 981 F.2d at 5-6. Imposing the discoverability test on private parties invoking § 1782 avoids "assisting a foreign litigant who desires to circumvent the forum nation's discovery rules by diverting a discovery request to an American court." *In re Letter Rogatory from the First Court of First Instance in Civil Matters, Caracas, Venezuela*, 42 F.3d at 310; *see also John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 136 (3d Cir. 1985) (refusing to "countenance the use of U.S. discovery procedures to evade the limitations placed on domestic pre-trial disclosure by foreign tribunals").

For example, in *In re Application of Malev Hungarian Airlines*, 964 F.2d 97 (2d Cir. 1992), a U.S. airplane engine manufacturer was subject to burdensome discovery pursuant to § 1782 merely because it filed a basic breach of contract suit in Hungarian court against Malev, the Hungarian national airline. Four days after answering the complaint in Hungarian court, Malev invoked § 1782, seeking depositions of officials of the American manufacturer as well as wide-ranging document discovery, including documents related to the manufacturer's contracts with other Eastern European national airlines and its development of certain jet engines. *See id.* at 98-99, 103. The district court denied the request because Malev had not first sought the discovery in Hungarian court, and cited the heavy burdens such an expansive reading of § 1782 would impose on U.S. courts. But the Second Circuit reversed — despite the fact that the American company had already subjected itself to the

jurisdiction of the Hungarian court and that Malev's broad discovery requests appeared to be "part of a strategy of delay and trench warfare." *Id.* at 103. The dissenting judge sharply rejected the contention that "section 1782 can be used as a matter of right against party litigants to supplant foreign procedures with discovery under United States rules," particularly "where the party and all the information sought are . . . subject to the process of the foreign court." *Id.* at 105-06 (Feinberg, J., dissenting). The dissent further predicted serious consequences for U.S. courts themselves if they continued to allow such broad discovery under § 1782: "[I]f the majority opinion stands, United States courts can be required to become global 'Special Masters for Discovery' to supervise proceedings in any court in the world . . . if either a litigant in the foreign court or its evidence can be found here." *Id.* at 103 (Feinberg, J., dissenting) (citations and quotation marks omitted). As commentators have explained in reaction to such decisions, "[t]he statute one-sidedly makes the United States person subject to the full range of discovery, as if the case were pending in the United States, whereas the foreign adversary – unless it 'resides or is found' in the United States – is not subject to the statute and is thus obliged to provide only such evidence as it may be required to make available under the rules of the foreign tribunal." Lawrence W. Newman & Michael Burrows, *U.S. Evidence for Foreign Tribunals*, 6/30/95 N.Y.L.J. 3 (col. 1); *see also id.* ("The consequence could be the expansive, almost routine, use of United States evidence-gathering processes by litigants in foreign cases involving either United States parties or transactions with links to the United States.").

2. The Ninth Circuit's decision invites abuse even where – as here – both competitors have a significant presence in the United States. Under the Ninth Circuit's

view of § 1782, as long as a domestic entity can find a foreign market in which its rival competes, that entity can invoke a proceeding in that foreign country and then obtain discovery in this country that it otherwise could obtain only by undertaking the substantial obligations of initiating a lawsuit. Companies will, therefore, have opportunities to obtain the sensitive business information of their rivals in circumstances where they would not otherwise be entitled even to seek it.

3. The Ninth Circuit's interpretation of § 1782 also ignores principles of international comity by placing the U.S. legal system "on a collision course with foreign tribunals and legislatures, which have carefully chosen the procedures and laws best suited for their concepts of litigation." *In re Application of Asta Medica,* 981 F.2d at 6. Broad discovery is not contemplated by the other procedural rules in foreign proceedings. As demonstrated, most foreign nations do not provide the kind of expansive discovery that the judicial systems of this nation allow. The Ninth Circuit's reading of § 1782 allows participants in foreign proceedings to end-run those limitations, and thus disrespects the fundamental choices other nations have made about how to structure their legal systems. *See* Jeffrey A. Wortman, *In Search of Discovery: The Split Between the Circuits Surrounding a Threshold Discoverability Requirement to Provide Assistance Under 28 U.S.C. § 1782*, 30 Tex. Int'l L.J. 583, 592 (1995).

II. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT DISCOVERY MAY NOT BE OBTAINED UNDER SECTION 1782 IF A FOREIGN ADJUDICATORY PROCEEDING IS NOT PENDING OR IMMINENT.

The Ninth Circuit also inappropriately rejected another sensible limit that other Circuits have placed on the availability of § 1782 discovery: the requirement that a foreign adjudicatory proceeding be pending, or at least imminent. The provision's text makes clear that Congress did not allow private parties to seek discovery in the United States when there is no ongoing, or at least impending, "proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a). But the Ninth Circuit did just that, permitting Advanced Micro Devices to obtain American-style discovery from Intel — its chief competitor — even though the European Commission was conducting only a preliminary inquiry into potential antitrust violations, and no proceeding was even remotely imminent. *See* Pet. at 12-16; Pet. App. 3a-7a. That decision has far-reaching implications, not only for the many U.S. companies subject to European antitrust inquiries like the one at issue here, but also for companies and individuals subject to any number of investigations by foreign and international entities.

Courts interpreting § 1782 often have sensibly denied requests from foreign governmental entities serving purely an investigatory function. For example, the Second Circuit has refused to allow discovery by the Director of Inspection enforcing India's Income Tax Act because § 1782 cannot be "so broad as to include all the plethora of [foreign] administrators whose decisions affect private parties." *In re Letters Rogatory Issued by the Director of Inspection of the*

Government of India, 385 F.2d 1017, 1021 (2d Cir. 1967) (Friendly, J.). Like tax assessors, other purely investigative agencies also have been denied discovery where they had no judicial function and no judicial or quasi-judicial proceedings were contemplated. *See, e.g., In re International Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil*, 936 F.2d at 706 (denying request for written discovery from Brazilian investigative agency); *Fonseca v. Blumenthal*, 620 F.2d 322 (2d Cir. 1980) (per curiam) (denying request for evidence by Superintendent of Exchange Control in Colombia); *In re Letters of Request to Examine Witnesses from the Court of Queen's Bench for Manitoba, Canada*, 59 F.R.D. 625, 629 (N.D. Cal.) (denying request for testimony from Canadian Commission of Inquiry "whose purpose is to investigate and report to the executive or legislative branches of government"), *aff'd*, 488 F.2d 511 (9th Cir. 1973).

Under the Ninth Circuit's interpretation, not only can these foreign authorities obtain discovery from U.S. companies when no judicial proceeding has been contemplated, but also any party that claims to be "interested" in an investigation could do the same. As a practical matter, and as courts have recognized, such an overly broad interpretation of § 1782 invites abuse. A foreign party could request that a foreign entity investigate a U.S. company solely so that the foreign party may invoke § 1782 — even where no foreign judicial proceeding is ongoing or impending, and where the foreign party would have no grounds to institute litigation in the United States or abroad. In this way, § 1782 could be used to obtain discovery where neither foreign nor domestic law would otherwise permit it; indeed, U.S. companies could find themselves besieged with discovery requests from abroad

despite being engaged in no pending or imminent overseas litigation. And foreign prosecutors and private "interested" parties could misuse information gathered via § 1782 in any number of ways: to build an entirely different case against the U.S. firm, either in U.S. court or overseas; to blackmail certain persons within or related to the company; to profit by selling the information to other entities; or (in the case of a business rival) to compete more effectively against a U.S. firm. That cannot be what Congress intended.

Indeed, that is precisely why U.S. courts have imposed the types of limitations on § 1782 discovery that the Ninth Circuit rejected below. Several courts require — even where the request comes from a foreign government entity — that the proceeding for which the discovery is sought be imminent. That is, "to guard against abuse of section 1782, the district court must insist on reliable indications of the likelihood that [judicial or quasi-judicial] proceedings will be instituted within a reasonable time." *In re Letter of Request from Crown Prosecution Service of United Kingdom*, 870 F.2d 686, 692 (D.C. Cir. 1989); *see also In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d at 1156 ("If the judge doubts that a proceeding is forthcoming, or suspects that the request is a 'fishing expedition' or a vehicle for harassment, the district court should deny the request."). These courts have recognized that even foreign government institutions may have ulterior motives for making their § 1782 requests, and that therefore U.S. courts must be cautious in their application of § 1782. As the Second Circuit put it in rejecting a request from Brazilian authorities, "[w]e imply no disrespect to the professionalism of the Brazilian investigative agencies, but we are obliged to construe the governing statute as it might be applied to a letter rogatory

from any country in the world." *In re International Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil*, 936 F.2d at 706; *see also In re Letters Rogatory Issued by the Director of Inspection of the Government of India*, 385 F.2d at 1020 (Congress did not "authoriz[e] a district court to execute letters rogatory whenever requested by a foreign country or a party there"). The risk of abuse is even more acute when private parties are invoking the provision, which is why the Eleventh Circuit has explained that a private individual seeking discovery "may need to be a litigant in a *pending* proceeding in order to be an 'interested person'" under § 1782. *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d at 1155 (emphasis added). Indeed, without such limitations, one could imagine a scenario where private individuals collude with foreign government officials to institute a preliminary investigation of a U.S. rival so that they can invoke § 1782 to obtain otherwise protected information from the U.S. company.

The Ninth Circuit's decision entirely ignores the careful balance struck by other courts to combat these opportunities for abuse of the American discovery process. This Court should grant certiorari and reverse.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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